

# THE TROUBLE WITH DRINK: INTOXICATION, (IN)CAPACITY, AND THE EVAPORATION OF CONSENT TO SEX

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## I. INTRODUCTION

In a recent essay, I analyzed the problematic way in which the criminal law on rape has evolved in the shadow of the mind/body dualism.<sup>1</sup> This paper develops some of those arguments about consent, mind, and body in light of a recent focus, in several criminal jurisdictions, on cases where the complainant in a rape trial has allegedly given consent to sexual intimacy whilst intoxicated. Although intoxication can result from the ingestion of drugs, alcohol, solvents or

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1. See Sharon Cowan, *Choosing Freely: Theoretically Reframing the Concept of Consent*, in CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY (Rosemary Hunter & Sharon Cowan eds., Routledge 2007) (Eng.).

other substances, this paper focuses, in the main, on the most commonly taken drug in Western societies – alcohol.<sup>2</sup>

The paper explores the contemporary concerns surrounding issues of intoxicated consent in cases of rape, particularly as expressed in U.K. case law, statute, and government policy. During the course of this paper, I will examine recent research on the problematic role of alcohol in sexual assault before going on to discuss specific policy and legislative responses to the problem of intoxicated consent. I will also engage in a close reading of several recent rape cases in the U.K. in which the capacity of the intoxicated complainant to consent to sexual intimacy has been of central concern. The paper deals only with *actus reus* aspects of how consent unfolds in rape cases, and in particular, what amounts to consent when a woman is extremely intoxicated to the point where her capacity to consent is in doubt.

For ease of reference and because statistically most rapists are men and most of those who are raped are women, and because the cases analyzed herein involve assaults by men perpetrated upon women, I will refer to victims of rape as “she” and perpetrators as “he,” though I fully acknowledge that this does not capture the whole spectrum of possibilities within the category “sexual offenses.”<sup>3</sup> I also will use the terms complainant and defendant, since much of the discussion focuses on English rape trials. Furthermore, many of the issues discussed herein have relevance outside of rape context, for example, in relation to sexual assault generally, and may also be of significance in other offenses against the person. However, for the purposes of this paper the analysis will concentrate on the paradigm sexual offense of rape.

A complainant’s intoxication can impact consent in a rape trial in two possible ways. First, the complainant and the defendant could disagree about the fact or level of intoxication – i.e., capacity, so that the defendant claims either that the complainant was not drunk at all, or that she was not drunk to the degree that she was incapable of consenting but merely was disinhibited, and therefore she was in fact capable of, and

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2. HOWARD PARKER ET AL., *ILLEGAL LEISURE: THE NORMALIZATION OF ADOLESCENT DRUG USE* 50 (Routledge 1998) (Eng.).

3. Specifically, I do not deal with problems of rape in non-heterosexual settings, though I recognize that many similar (and dissimilar) issues as to credibility and stereotypical expectations of socio-sexual behavior will arise. I also recognize that this paper focuses somewhat narrowly on the ways in which intoxication and gender interact to disadvantage women in the court room, without an analysis of these issues within the context of, and intersection with, other axes of marginalization such as race, class, sexual orientation, and mental ill-health. Finally, I do not discuss the issue of the defendant’s intoxication as this is a *mens rea* issue and this paper deals only with *actus reus* aspects of consent, in so far as they can be separated.

did, consent. Second, there could be disagreement about whether or not there was consent – i.e., the defendant claims that the complainant gave consent, albeit drunken, and that she was capable even though intoxicated, whereas the complainant states that she cannot remember what happened because she was extremely drunk but that she knows that she did not want to have sex with the defendant (and she may also claim that she was too drunk to resist). The claim then could be either that she was not intoxicated (enough) and capable, or, that despite a high level of intoxication, she did consent.

Sometimes, as in the case of *R. v. Bree*,<sup>4</sup> discussed below, these arguments converge. However, regardless of how the defense argument is presented, this paper argues that there should be both greater legislative clarity on the issue of capacity, and more detailed guidance available to both judges and juries on how to treat the issue of intoxication in rape cases. As it stands, the criminal law does not provide adequate protection to women who are raped. In particular, this paper proposes that there ought to be a level of intoxication beyond which the complainant's capacity is in serious doubt, and, consequently, the defendant's claim of consent (or belief in consent) is called into question.

Many feminists have recognized that law reform by itself will never solve the problem of rape. Social change regarding gendered expectations of appropriate sexual activity and beliefs about responsibility for sexual assault is also crucial. Therefore, in relation to sexual intimacy and intoxication, we need to know more, empirically, about women's – and men's – socio-sexual behavior, and we must also engage with the difficult educative process of shifting prejudices. Whilst acknowledging that, I will nonetheless argue that legal reform is necessary in order to have legislative clarity on central concepts such as capacity as well as more substantive guidance for judges and juries on the issue of (in)capacity, so that women who are extremely intoxicated are better protected from predatory (and/or extremely drunk) men who either cause or take advantage of their lack of capacity to consent to sexual intimacy.

## II. CONSENT AND INTOXICATION

The starting concern in an analysis of this nature is often to attempt to clearly define what is meant by consent. This is an issue that I have

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4. *R. v. Bree*, [2007] EWCA Crim 804, [2007] 2 Crim. App. R. 13 (appeal taken from Eng.) (U.K.).

examined in some detail in earlier work.<sup>5</sup> Debates as to the nature of consent focus on determining whether consent is a state of mind, or whether consent is constituted by a set of actions or behaviors, performed in certain way. This question has animated many legal and other philosophers and has been of particular importance in the rape context, because the issue of consent has proved to be the main focal point of most rape trials.

The polarized positions taken in this definitional debate are represented briefly here in summaries of the work of philosophers Heidi Hurd and Nathan Brett, who have both written on this subject in the context of rape.<sup>6</sup> In her paper "*The Moral Magic of Consent*," Hurd perceives consent as attitudinal.<sup>7</sup> She argues that "a person does all that she needs to do in order to alter the *moral* rights or obligations of another simply by entertaining the *mens rea* of consent"<sup>8</sup> – that is, consent is an attitude, formed in the *mind* of the consenter.<sup>9</sup> Only if the consenter intends to consent to (allow, enable) another's actions will that amount to valid consent.<sup>10</sup> Hurd rejects the suggestion that consent is a combination of intention and an action, since an action can only ever be evidence of mental state, and therefore cannot replace intention as being of primary moral relevance.<sup>11</sup>

Nathan Brett, on the other hand, perceives consent to be a performative action.<sup>12</sup> For him, the parties change their rights and obligations by giving permission, which is achieved by speaking or doing consent.<sup>13</sup> He highlights the fact that consent in a medical law context could not properly be said to be purely a state of mind.<sup>14</sup> Consent is "not an attitude at all. It is to act in a way that has conventional significance in communicating permission."<sup>15</sup> Consent as constituted by a mental state does not work in the context of sex because we are often ambivalent in our attitudes about sex, he argues.<sup>16</sup>

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5. Cowan, *supra* note 1.

6. See Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996) (Eng.); Nathan Brett, *Sexual Offenses and Consent*, 11 CAN. J.L. & JURIS. 69, 69-88 (1998).

7. See Hurd, *supra* note 6.

8. *Id.* at 122.

9. *Id.*

10. *Id.* at 125, 130.

11. See *id.*

12. Brett, *supra* note 6.

13. *Id.* at 69.

14. *Id.* at 70.

15. *Id.* at 73.

16. *Id.*

Therefore, the matter turns on what we do or say to give the other party permission to act.<sup>17</sup>

This overview of the complex and polarized debate on what constitutes consent, as exemplified in the work of Hurd and Brett, gives a flavor of the often conflicted nature of the conversation. However, both positions pose problems for feminists who wish to reform the law of rape. To say that consent is only a mental attitude does not address the question of ambivalent mental states, and further, how parties are to discern consent. But to maintain that consent is purely performative could minimize the contextual importance of substantive conditions that drive consent, and could therefore be over-inclusive. Both positions are evident in the history of rape law; the lengthy and ongoing debate over what counts as consent in rape laws takes place against this backdrop of whether mind or body can properly be said to be the locus of consent. Law reform in many countries has led to the replacement of rape laws that focus upon bodily force and resistance with laws that look more to the negation of will and violation of the victim's autonomy. Nonetheless, in a rape trial, evidence as to consent, and its lack, is most often presented through a close analysis of the bodily responses and behaviors of the raped woman.<sup>18</sup>

In addition, rape law often concentrates on one or the other, body or mind, or treats one as if it were independent of the other. I have previously argued that rape law should try to avoid the dichotomy of mind/body, and instead should encapsulate elements of both body and mind. That is, we can only properly see the harm of rape if we understand that there is a relationship between mind and body; but also we cannot conceptualize consent without proper attention to both body and mind – i.e., where sexual intimacy is to take place, particularly between those who are not already intimate, there must be both a positive state of mind and an expressive action before consent is present. There are many who would contest this view, and I have defended it elsewhere.<sup>19</sup> In this context I wish to address the challenge that arises when defining consent where the victim of an alleged rape is intoxicated. Whether one believes consent truly to be a state of mind or an action, intoxication further complicates the issue. If consent is a state of mind, being in an intoxicated state can make it extremely difficult to come to a settled state of mind since intoxicants clearly affect one's rational

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17. *Id.* at 80.

18. See Cowan, *supra* note 1 for a more in-depth discussion of these matters.

19. *Id.*

capacities (and of course it can also be very difficult for others to read one's state of mind). If, on the other hand, consent is an action, intoxicants can impair the physical and verbal abilities to the extent that action is either impossible or, again, difficult to read. Either way intoxication can render consent obscure. To argue that a proper understanding of consent requires attention to both body and mind does not necessarily help us here, where both body and mind are affected by intoxication. How then to deal with the issue of a complainant's intoxicated consent?

This paper attends to the particular problem of understanding consent in the context of intoxication, arguing that the law on capacity to consent in intoxication cases is unclear and does not provide proper protection to women from rape and sexual assault. Following on from the discussion about how consent is constituted, one might now also expect a definition of the other central concept of this paper – intoxication. However, the idea that intoxication can be neatly classified is one of the main problems analyzed herein. As stated above, intoxicants clearly affect the mind and also, by extension, the body. But the threshold between 'sobriety' and 'intoxication' varies from person to person, and cannot be stated with any general certainty. At this point in the paper it is sufficient to say that to be in a state of intoxication means that one's mental and physical capacities are substantially altered from one's 'sober' state, through the ingestion of intoxicating substances. The question of what bearing this has on one's ability to be a rational, choosing, autonomous subject will be discussed in some detail. As a preliminary issue, we will turn to the backdrop of intoxicated consent by examining the place of intoxication in sexual assaults generally, alongside an increasing public awareness of this problem.

### III. ALCOHOL AND SEXUAL ASSAULT

Research has shown that the level of alcohol use in sexual assault cases is alarmingly high. Andrea Finney's 2004 summary of various research studies in this area shows that around 60% of perpetrators have been drinking just prior to the offense of sexual assault.<sup>20</sup> However, statistics on the proportion of victims who have been drinking prior to the offense vary widely and depend partially on the sample – for instance, in student populations, up to 81% of incidents can involve

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20. ANDREA FINNEY, HOME OFFICE, FINDINGS 215: ALCOHOL AND SEXUAL VIOLENCE: KEY FINDINGS FROM THE RESEARCH 2 (2004) (U.K.), *available at* <http://www.homeoffice.gov.uk/rds/pdfs04/r215.pdf>.

drinking on the part of the victim.<sup>21</sup> There has been no substantive research on intoxication of victims in the U.K. to date and the data referred to by Finney is generated in the U.S.<sup>22</sup> However, more recent research in the U.K. (aimed at analyzing the attrition rate in rape cases rather than the rate of alcohol consumption per se) found that in a sample of 676 cases over eight police force areas, 38% of victims aged 16 and above had been drinking, though not necessarily to the point of intoxication, prior to the assault.<sup>23</sup>

Against that general backdrop, intoxicated consent to sex is an issue that has been given serious consideration in the U.K. recently. Two particular incidents are worth noting as critical moments leading to, amongst other things, a 2006 government report in the form of a Home Office consultation document.<sup>24</sup> The first critical moment was a trial in Swansea Crown court in 2005, *R. v. Dougal*, where the judge directed the jury to acquit the defendant in the middle of the trial.<sup>25</sup> The prosecution stated that they could not proceed because the complainant could not remember, because of intoxication through alcohol consumption, whether or not she had agreed to have sex with the defendant, who was a security guard at her University residence.<sup>26</sup> While she asserted that there was no way she would have agreed to have sex with the man, who was a complete stranger to her, she could not remember whether she had actually consented or not, and the jury was instructed to find the defendant not guilty, the judge remarking that

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21. *Id.* at 2.

22. *Id.* This data also suggests that alcohol related sexual assaults are more likely to occur between people who do not know each other, in contradistinction to the long established sociological finding that, in general, most sexual assaults occur between people who know each other. However, we must be aware of the problem of under reporting. Survey data, such as that of the British Crime Survey, demonstrates that rapes involving intimates or acquaintances are less likely to be reported than rape involving strangers. See ANDY MYHILL & JONATHAN ALLEN, HOME OFFICE, FINDINGS 159: RAPE AND SEXUAL ASSAULT OF WOMEN: FINDINGS FROM THE BRITISH CRIME SURVEY 5 (2002) (U.K.), available at <http://www.rapecrisis.org.uk/HOFindings159.pdf>. It is not clear how many of these non-reported incidents involve alcohol use.

23. ANDY FEIST ET AL., HOME OFFICE, INVESTIGATING AND DETECTING RECORDED OFFENCES OF RAPE 18 (2007) (U.K.), <http://www.homeoffice.gov.uk/rds/pdfs07/rdsolr1807.pdf>. As the study was not specifically designed to measure alcohol intake in victims of rape, these figures are most likely an underestimate. On alcohol and sexual assault see also Miranda A. H. Horvath & Jennifer Brown, *The Role of Alcohol and Drugs in Rape*, 46 MED. SCI. AND LAW 219, 223 (2006).

24. See OFFICE FOR CRIMINAL JUSTICE REFORM, CONVICTING RAPISTS AND PROTECTING VICTIMS – JUSTICE FOR VICTIMS OF RAPE (2006) (Eng.), available at <http://www.homeoffice.gov.uk/documents/cons-290306-justice-rape-victims?view=Binary>.

25. *Id.* at 7. This case was not reported as the trial was discontinued.

26. Clare Dyer, *Calls for Inquiry After Rape Case Collapses over "Drunken Consent"*, THE GUARDIAN, Nov. 24, 2005, at 4.

“drunken consent is still consent.”<sup>27</sup> The case received large-scale critical media attention, was perceived to demonstrate the intractable problems of discerning consent to sexual intimacy when intoxication is involved, and was specifically identified as problematic both by the government consultation paper mentioned above, and by the Court of Appeal in the more recent and pivotal case of *R. v. Bree*, discussed below.<sup>28</sup>

The second moment was the widespread media reporting and critique of the findings of a survey on public perceptions of rape victims, carried out in 2005 in England and Wales by Amnesty International.<sup>29</sup> The report suggested that almost a third (30%) of respondents believed that a woman who had been drinking and who was subsequently raped was at least partially responsible for the attack.<sup>30</sup> A Scottish study on attitudes towards rape and domestic violence recently reported broadly similar findings.<sup>31</sup> Alongside a more general governmental concern with binge drinking, and the problem of underage and teenage alcohol consumption,<sup>32</sup> the media attention given to these two moments highlight an increasing public awareness in the U.K. of the issue of the impact of intoxication on capacity to consent to sexual intimacy.

These incidents culminated in the U.K. Home Office consultation document, referred to above, on the operation of sexual offenses legislation in England and Wales. In this document, the government acknowledged that victim intoxication is a key concern, particularly in a climate of extremely low conviction rates for rape.<sup>33</sup> The legislation

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27. *R. v. Bree*, [2007] EWCA Crim 804, [2007] 2 Crim. App. R. 13 (appeal taken from Eng.) (U.K.). The Court of Appeal in *Bree*, discussed below, admitted that this phrase “lacked delicacy.” *Id.* Andrew Ashworth has recommended that the expression should not be used by judges in rape cases. Andrew Ashworth, Comment, *Rape: Consent – Intoxication*, CRIM L. R. 2007, Nov., 900, 903. Because the *R. v. Dougal* trial was abandoned, there is no official report of the case. *But see* Dyer, *supra* note 26.

28. *Bree*, [2007] EWCA Crim 804, [2007] 2 Crim. App. R. 13 (appeal taken from Eng.) (U.K.).

29. See ICM, SEXUAL ASSAULT RESEARCH SUMMARY REPORT 5 (2005) (prepared for Amnesty International U.K.).

30. *Id.* at 5.

31. 27% of people thought a woman was responsible for the attack if she was drunk. OFFICE OF CHIEF RESEARCHER, DOMESTIC ABUSE 2006/07: POST-CAMPAIGN EVALUATION 15, 2007 (Scot.), <http://www.scotland.gov.uk/socialresearch>.

32. The current U.K. Prime Minister Gordon Brown has recently announced an intention to crack down on binge drinking and on the sale of very cheap alcoholic drinks in pubs, particularly as this impacts young drinkers; see *Brown Backs Alcohol Sales Crackdown*, GUARDIAN UNLIMITED, Nov. 21, 2007, <http://www.guardian.co.uk/uklatest/story/0,-7093916,00.html>.

33. See LIZ KELLY ET AL., HOME OFFICE RESEARCH STUDY 293: A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES 63 (2005) (U.K.), available at <http://www.homeoffice.gov.uk/rds/pdfs05/hors293.pdf>. See also HER MAJESTY’S CROWN



under scrutiny, the Sexual Offences Act 2003, defines consent in section 74 as agreement by choice, where the person has the “freedom and capacity to make that choice.”<sup>34</sup> The consultation document recognized that this use of the term ‘capacity’ raised some difficulties as regards the validity of drunken consent. Section 75 of the Sexual Offences Act 2003 specifically sets out a list of situations where non-consent will be presumed (though the presumption is rebuttable).<sup>35</sup> One of these non-consent presumptions will arise where a substance which has the potential to cause or enable the victim to be stupefied or overpowered has been given to an individual prior to sexual activity (section 75(2)(f)); however, there is no mention of any mental state short of ‘stupefaction,’ or of voluntary as opposed to involuntary intoxication.<sup>36</sup> This raises the key issue of how to deal with the situation where a woman has been voluntarily drinking and is intoxicated short of the point of unconsciousness, but where her “capacity” to choose has been undermined or eliminated through intoxication.

#### IV. DEFINING CAPACITY TO CHOOSE

The central questions about intoxicated consent posed by the consultation document were whether or not there should be a statutory definition of capacity; and whether the Sexual Offences Act 2003 ought to be amended to introduce a rebuttable presumption that consent was absent if it was given by the complainant while she was a state of extreme drunkenness. The U.K. tabloid media responded somewhat hysterically to this suggestion by speculating that the government would try to set a ‘drink and sex limit,’ similar to the drink-driving limit.<sup>37</sup> This would involve the police carrying out blood and urine tests, and then scientists using ‘back calculations’ to work out how drunk the woman had been.<sup>38</sup> Notwithstanding the concerns of varying individual responses to alcohol consumption, the practice is often relied upon,

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PROSECUTION SERVICE INSPECTORATE & HER MAJESTY’S INSPECTORATE OF CONSTABULARY,  
WITHOUT CONSENT: A REPORT ON THE JOINT REVIEW OF THE INVESTIGATION AND PROSECUTION  
OF RAPE OFFENCES (2007) (U.K.) available at  
[http://www.hmcpis.gov.uk/reports/Without\\_Consent\\_Thematic.pdf](http://www.hmcpis.gov.uk/reports/Without_Consent_Thematic.pdf).

34. Sexual Offences Act, 2003, c. 42, § 74 (U.K.).

35. *Id.* § 75.

36. *Id.*

37. *See Men Face Jail for Rape if Women are ‘Too Drunk’ to Consent in Bed to Boost Convictions*, THIS IS LONDON, Dec. 28, 2008, <http://www.thisislondon.co.uk/news/article-23379673details/Men+face+jail+for+rape+if+women+are+%27too+drunk%27+to+consent+in+bed+to+boost+convictions/article.do>.

38. *Id.*

allowing for a certain margin of error, in the context of proving a charge of driving under the influence of alcohol or drugs. However, the House of Lords in *Gumbley v. Cunningham* has suggested that the practice should not be routinely relied upon, and can only be used where it is irrefutable (allowing for the maximum level of error), that the driver would have been over the legal alcohol limit at the time of the alleged offense.<sup>39</sup> In such cases the test results will provide the central plank of the prosecution's evidence, and the offense is one of strict liability.

However the test results would be used in a probatively different sense in a rape trial and the anxiety expressed about the use of such tests in the rape context is probably misplaced. The Crown Prosecution Service in England and Wales in their guidance to prosecutors of rape cases have explicitly stated that prosecutors should consider the use of experts to 'back calculate' how intoxicated a woman was at the time of the alleged attack.<sup>40</sup> Although Andrew Ashworth argues that this will not always be a helpful test, since a woman can still agree to have sex in advanced stages of intoxication,<sup>41</sup> and, as already mentioned, the test is not scientifically precisely accurate, in rape cases the test result would not be the main piece of evidence upon which the prosecution would rely in order to prove the charge of rape. Indeed, since rape is not a strict liability offense, the calculation could never be used to establish a defendant's guilt, which will always rest upon the prosecution having demonstrated the relevant *mens rea*. But the test results could conceivably form one piece of evidence to be taken into account as to the likely level of the complainant's intoxication.

Similarly resistant to reform, the President of the Queen's Bench division of the Court of Appeal in England and Wales, Sir Igor Judge, has recently commented, in the case of *R. v. Bree*, on the question of the need for a statutory framework in rape cases to help courts decide whether too much alcohol had been consumed for consent to be valid.<sup>42</sup> Sir Judge stated in *Bree* that it is the role of the court to decide whether or not the woman's capacity has been diminished to the degree that consent is not possible, and that this is not an issue that can be

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39. *Gumbley v. Cunningham*, [1989] A.C. 281 (Eng.). For discussion, see J. K. Mason, *Back-calculation and the Crown Agents' Letters* (2000) 5 SCOT. L. & P.Q. 25; and SHARON COWAN & A. C. HUNT, *MASON'S FORENSIC MEDICINE FOR LAWYERS* (Tottel 5th ed. 2008) (U.K.).

40. THE CROWN PROSECUTION SERVICE: SEXUAL OFFENCES ACT 2003, [http://www.cps.gov.uk/legal/section7/chapter\\_a.html](http://www.cps.gov.uk/legal/section7/chapter_a.html) (last visited March 10, 2008).

41. Ashworth, *supra* note 27, at 901.

42. [2007] EWCA Crim 804, [2007] 2 Crim. App. R. 13 (appeal taken from Eng.) (U.K.). The case is discussed in detail below.

appropriately decided by a statutory tariff system.<sup>43</sup> Given that those in favor of a capacity test tend to do so from the perspective of preventing women from being ‘taken advantage of’ and thereby protecting their sexual and bodily autonomy, Sir Judge somewhat ironically suggested that such a statutory test could interfere with the autonomy of drunken women to choose to have sex.

It would be problematic to have a blanket rule that the consumption of a certain number of units of alcohol by itself renders consensual sex impossible. In some of these kinds of cases the woman will desire, and expressly consent to, sex. Further, the presence and validity of consent is also related to the question of the relationship between the parties – the issues may be very different in relation to a couple who have been intimate over a long period of time, as opposed to two people who have just met or barely know each other.<sup>44</sup> In that sense any rigid rule that a certain level of intoxication would cancel out consent, contravenes principles of autonomy. But there may still be room to argue that, absent a prior agreement that sex should take place when very drunk or unconscious, a state of *extreme* drunkenness can impede the capacity to consent to sexual intimacy, particularly in the kinds of cases discussed below, where the parties barely know each other. This raises two distinct concerns: first, how do we retain skepticism about extremely intoxicated consent while avoiding a paternalistic and rigid rule negating the possibility of drunken consent; and second how do we define extreme intoxication, i.e. incapacity?

In answer to the first concern, one possible avenue would be to include extreme drunkenness within the 2003 Act’s list of rebuttable presumptions of lack of consent. Rather than a blanket rule that consent can never exist in such circumstances, extreme drunkenness could give rise to a presumption of a lack of consent, a presumption which will stand unless the defendant can show either that the complainant was not extremely drunk and there had been express consent to drunken sex prior to the act of extremely intoxicated intimacy, or, that he had a reasonable belief that this was the case (which is obviously a *mens rea* issue). This rebuttable presumption model is the sort of route taken in the Sexual Offences Act 2003 in England and Wales, though extreme drunkenness is not one of the situations listed in the act that would give rise to an evidential presumption of non-consent.<sup>45</sup>

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43. *See id.*

44. *See Cowan, supra* note 1, for discussion of this issue. Thanks also to Victor Tadros for reminding me of this point.

45. Evidence raised to rebut the presumption, which could either be evidence of consent or

Another possible route, somewhat similar, is that recently proposed by the Scottish Law Commission (SLC) in their 2007 *Report on Rape and Other Sexual Offences*.<sup>46</sup> Following a review of the law and a consultation exercise, the SLC has recommended to the Scottish government that there should be a list, similar to that which appears in section 75 of the 2003 Sexual Offences Act discussed above, of ‘particular definitions’ or factual situations of non-consent.<sup>47</sup> Unlike the 2003 Act, which states that where, for example, consent is obtained by force, this force is evidence of a lack of consent, the SLC prefers the approach that such circumstances are *constitutive* of a lack of consent.<sup>48</sup> The SLC set out a non-exhaustive list of non-consensual situations which includes the factual situation where a person “had taken or been given alcohol or other substances and as a result lacked capacity to consent at the time of expressing or indicating consent unless consent had been given to engaging in the activity in that condition.”<sup>49</sup> The court is therefore put on notice that when capacity through intoxication is in doubt, it is irrelevant how that intoxication came about.

While it is possible that neither of these routes would provide a complete solution to the problem of defining consent or lack of consent, it is at least evident that a statutory response to the question, ‘How do we retain suspicion about capacity where intoxicated consent is given and simultaneously avoid overly restricting autonomy?’ is possible. The legal profession’s response to the U.K. government 2006 consultation on rape was predominantly in favor of leaving the law as it currently stands, on the basis that it would be an over-reaction to change the law because of one exceptional case – *R. v. Dougal* – which did not fundamentally demonstrate the inadequacy of the law.<sup>50</sup>

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evidence as to a belief in consent that is reasonable in all the circumstances, must then be disproved by the prosecution in order for a rape conviction to result. See Sexual Offences Act 2003 section 75. Criticism of this formulation and approach to the problem has been raised by scholars such as: Sharon Cowan et al., *Open Letter to the Scottish Law Commission’s Consultant Document*, 25 S. L. T. 157, 159 (2006); Victor Tadros, *Rape Without Consent*, 26 OXFORD J. OF LEGAL STUD. 515, 528 (2006); DAVID ORMEROD, SMITH AND HOGAN CRIMINAL LAW 602-11 (Oxford 11th ed. 2005); Jennifer Temkin & Andrew Ashworth, *Rape, Sexual Assaults and the Problems of Consent*, CRIM. L. REV. 2004, MAY 328, 336 (2004).

46. SCOTTISH LAW COMMISSION, REPORT ON RAPE AND OTHER SEXUAL OFFENCES (2007) (U.K.).

47. *Id.*

48. *Id.* The list is also dissimilar to that set out in the 2003 Act in that the SLC have, laudably, proposed a non-exhaustive list of possible non-consensual situations where the 2003 Act legislates for an exhaustive list.

49. *Id.* at 29.

50. OFFICE OF CRIMINAL JUSTICE REFORM, CONVICTING RAPISTS AND PROTECTING VICTIMS – JUSTICE FOR VICTIMS OF RAPE: RESPONSE TO CONSULTATION 7 (2007) (U.K.). This is doubly

Rumney and Fenton point out that it is not uncommon for judges to be critical of government proposals for rape law reform.<sup>51</sup> But, they rightly argue, leaving extreme drunkenness out of the section 75 rebuttable presumptions list implies a hierarchy of intoxicated victims; individuals who are involuntarily intoxicated are given specific legal protection by including them in the list, whilst those who are voluntarily intoxicated are left to fit themselves within the general terms of section 74 of the 2003 Act. Excluding voluntary intoxication in this way is likely to be problematic, as discussed below. In any case it appears, unfortunately, that the U.K. government has now decided that legislative clarification or reform of the status of voluntarily intoxicated and incapacitated victims is unnecessary.<sup>52</sup>

As to the second issue, the problem of how to discern whether a woman is so drunk as to be *incapable* of consent due to alcohol consumption remains. The question of whether an individual woman is intoxicated to the point of being incapable of consent is a matter of the facts and circumstances of each case. Each person will reach the stage of 'extreme drunkenness' at a different point – someone who has never had alcohol will become extremely drunk well before someone who is a habitual heavy drinker. The individual nature of this threshold cannot be captured in a legislative test. Leaving aside the possibility of a more abstract statutory definition of the principles of capacity,<sup>53</sup> there is strong evidence that putting the issue of (in)capacity solely in the hands of the jury is problematic. It is evident from research carried out in the U.K. by Vanessa Munro and Emily Finch, that when left to the jury, questions of capacity to consent to sexual intercourse are subject to ongoing prejudicial beliefs about appropriate gendered behavior, and ultimately, the underlying tenacious notion that a woman assumes the

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unfortunate since the reason given by the Home Office for not introducing reform is that the court in a recent case, *R. v. Bree*, has given some judicial guidance on the concept of capacity. *Id.* at 10-11. However, this case, as I discuss below, does not provide adequate guidance on incapacity to consent to sexual intimacy.

51. Philip N.S. Rumney & Rachel Anne Fenton, *Intoxicated Consent in Rape: Bree and Juror Decision-Making*, 71 MOD. L. R. 279 (2008). The consultation document itself, they highlight, makes unsubstantiated speculative reference to the possibility that statutory reforms which would include extreme drunkenness as a rebuttable presumption situation could lead to mischievous accusations. *Id.*

52. Joshua Rozenberg, *Law on Consent in Rape Cases is Clear Enough*, DAILY TELEGRAPH, June 19, 2007, at 2. See footnote 50, above.

53. See, for example, the definition given in PETER ROOK & ROBERT WARD, ROOK AND WARD ON SEXUAL OFFENCES LAW AND PRACTICE 90 (3rd ed. 2004) or Sexual Offences Act, 2003, c. 42, § 30(2) (U.K.), referring to mental incapacity, or the simpler test referred to by Ashworth – awareness, understanding and ability. See generally Ashworth, *supra* note 27.

risk of any harm of sexual assault, and thus bears responsibility for any attack perpetrated upon her, particularly where she has been drinking.<sup>54</sup>

While many jurors in the Finch and Munro study of mock rape trials recognized that the perpetrator bore some responsibility for the sexual assault, a significant number of them treated the issue of responsibility as what David Archard has called a “zero-sum picture;”<sup>55</sup> that is, if the woman was perceived to bear some responsibility for the rape – for example if the jury blamed her for not being fully in control of her glass which the perpetrator later spiked with alcohol – this sufficiently diminished the perpetrator’s responsibility, leading to his acquittal in the rape charge.<sup>56</sup> In addition, the 2005 Amnesty International Poll referred to above demonstrated that many of the people surveyed (ordinary, though one might say, not necessarily reasonable, people), still believe that a woman who has been drinking is in some way to blame if she is sexually assaulted.<sup>57</sup> Leaving the issue of capacity to the jury, then, is not necessarily the answer to the problem of intoxicated consent.

Alongside questions of jury prejudice, there is the question of what direction the trial judge should give to the jury. In England and Wales, out with the general terms of the Sexual Offences Act 2003, there is no form of judicial guidance on the meaning of any of its terms, much less the terms of the all important section 74, such as capacity, freedom, and so on. Thus, the judge has no guidelines on how to assist the jury in deciding, for example, what bearing the victim’s intoxication has upon her capacity to consent. The question seems to be, simply, did the victim have capacity to consent or not? The more difficult question as to what that actually means in practice is left unresolved. In the next section I will analyze two recent cases in order to demonstrate the challenges courts face in dealing with intoxicated consent, and the unsatisfactory and discriminatory way in which the U.K. judiciary treats capacity to consent (and more importantly incapacity as to consent).

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54. Emily Finch & Vanessa Munro, *Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants: The Findings of a Pilot Study*, 45 BRIT. J. CRIMINOL. 25, 30 (2005) [hereinafter, Finch & Munro, *Juror Stereotypes*]; see Emily Finch & Vanessa Munro, *Breaking Boundaries?: Sexual Consent in the Jury Room*, 26 LEGAL STUD. 303, 318 (2006) [hereinafter, Finch & Munro, *Breaking Boundaries*]; Emily Finch & Vanessa Munro, *The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants*, 16 SOC. AND LEGAL STUD. 591 (2007) [hereinafter Finch & Munro, *Demon Drink*].

55. DAVID ARCHARD, *SEXUAL CONSENT* 139 (Westview 1998).

56. *Id.*

57. Finch & Munro, *Demon Drink*, *supra* note 54, at 593 (citing the 2005 Amnesty International poll).

## V. THE 'EVAPORATION' OF CAPACITY TO CONSENT: SIDESTEPPING THE ISSUE?

So where exactly does the dividing line between capacity and incapacity, when intoxication is involved, fall? The most recent English case in the area, *R. v. Bree*,<sup>58</sup> has thrown this question into sharp relief. A brief discussion of the facts is necessary to demonstrate the court's approach to intoxication and capacity to consent.

Two young women went out for the evening with two young men and all four became drunk.<sup>59</sup> One of the couples returned to the complainant's flat, where the woman became sick. The defendant found her on her bathroom floor and said that he 'looked after her' – washed her hair, found pajamas for her, and left the room while she changed. At this point the accounts of the complainant and defendant diverged. The complainant maintained that she awoke to find the defendant having sex with her, that she did not want to have sex, and that she was saying no in her head but that alcohol had diminished her ability to physically resist. However, her memory of events was patchy and she could not remember what was said or done throughout the entire event. The defendant maintained that she was a conscious, willing, and active participant and had removed her own pajamas. He argued that while she had been drinking, and was influenced by alcohol, she was "not drunk and incapable."<sup>60</sup> The defendant was convicted, but his conviction was quashed on appeal because the Court of Appeal found that the jury lacked proper direction from the trial judge regarding the impact of intoxication upon the complainant's capacity to consent.<sup>61</sup>

One of the problems for the prosecution in *Bree* was that initially their case had rested on the fact that the victim was unconscious during the event.<sup>62</sup> If this account had been credible to the jury, incapacity would have been established. However, it became clear during the trial process that this was in fact not so, and that the complainant had been conscious for at least some of the duration of the sexual intercourse.<sup>63</sup>

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58. *R. v. Bree*, [2007] EWCA Crim 804, [2007] 2 Crim. App. R. 13 (appeal taken from Eng.) (U.K.).

59. *Id.* at 160-61.

60. *Id.* at 162.

61. *Id.* The court criticized the judge in *R. v. Dougal* for stating that there was no case to answer because the complainant could not remember what had happened. *Id.* at 166. In this respect, *Bree* was followed in the case of *R. v. H*, [2007] EWCA Crim 2056, 32 (appeal taken from Eng.). The court here again stated that matters of capacity should be left to the jury. *Id.*

62. *Bree*, [2007] EWCA Crim 804, [2007] 2 Crim. App. R. 13 (appeal taken from Eng.) (U.K.).

63. *Id.*

At closing arguments, the Crown's case was that she had been conscious and had the capacity to consent, but that she had not consented, and had not resisted because of the effects of alcohol.<sup>64</sup>

Here, as in *R. v. Dougal*, the trial judge stated that "drunken consent is still consent," but the key question as he saw it, was whether sex had occurred without consent.<sup>65</sup> While the prosecution seemed to accept that the complainant did have capacity because she had been conscious for some of the period of intimacy, the conviction was overturned on appeal at least in part because the judge did not give specific enough guidance on what the impact of the intoxication would have been on the victim's capacity to consent, and the differential impact upon capacity to consent of being unconscious as opposed to being conscious but very drunk.<sup>66</sup> The fact that the judge had not addressed the question of whether the victim would have behaved in the same way had she been sober was a specific omission identified by the Court of Appeal.<sup>67</sup>

This may well be the kind of case (if not this case in particular) which raises genuinely difficult issues, especially problems of proof, where both people involved are very drunk and the accounts differ as to the detail of what happened and when it happened. But the question of whether or not an individual would have behaved similarly had she been sober is arguably irrelevant to the question of whether or not she had the capacity to consent, and indeed, whether or not she did consent in this instance. The complexities of establishing consent or its lack do not absolve the judge of his duty to properly guide the jury on the issue of capacity. But how do we know when a woman is too drunk to consent? How do we know whether or not she has consented to sex if she herself does not know, because she cannot remember the events? *R. v. Bree*, alongside *R. v. Dougal* and other cases such as *R. v. Gardner*, discussed below, seems to suggest that if she cannot remember a refusal, or indeed if she cannot remember anything at all, providing she was conscious, then she will be presumed to have consented, or at least, the man's belief in her consent will stand, and it is not rape.

While on the one hand it is clearly unfair to convict someone of an offense they have not committed, on the other, it is similarly egregious to leave uncontested the notion that someone who is drunk enough to have memory blackouts and be vomiting, with periods of unconsciousness (like the complainant in *R. v. Bree*) can be presumed to

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64. *Id.*

65. *Id.* at 167.

66. *Id.*

67. *Id.* at 169.



have the capacity to consent. In other words, here consciousness seems to stand in for capacity, regardless of the fact that the complainant herself says she did not want to have sex and that she felt unable to physically resist when she was conscious. Here, the law reads from the event *enough* capacity to consent to sexual activity, despite the complainant's extremely inebriated state. The crucial questions here then are how much drunkenness is too much, i.e., how much impedes and negates one's ability to consent; in other words, what do we mean by capacity in this context, and how does this impact on consent?

Rightly, the Court of Appeal was critical of the lack of guidance given by the judge to the jury as to the role of intoxication in the case. However, the Court of Appeal's judgment was itself lacking in proper guidance on this issue. The court in *Bree* accepts that there is a point before unconsciousness where the capacity to consent can "evaporate,"<sup>68</sup> but again there is no proffered assistance on where this point might be. One might be tempted to think that if a person is drunk to the point of having been sick and been put to bed, and is having memory blackouts, that this might be such a point, but this does not seem to be the conclusion drawn in *R. v. Bree*. While the court stresses that the question of capacity is an individual contextually specific one, there is no suggestion that this is the *kind* of case, these are the *kinds* of facts, that might invite us to be skeptical about capacity. Instead the complainant's inability to remember, to know whether or not she consented (out with the confines of her own head), becomes the space where the defendant's belief in consent occupies and takes root. Similarly, while in the *R. v. Dougal* case, the complainant asserts that she would not have had sex with the defendant who was unknown to her, because she cannot remember having actually said no, doubt remains either that she may have said yes, or at least her lack of refusal can be reasonably interpreted as a yes, and the defendant is acquitted. This is despite the fact that in English law, at least, there is no obligation upon the complainant to have explicitly refused consent to intercourse, because submission is not equivalent to consent.<sup>69</sup>

The court clearly states in *R. v. Bree* that the problem in intoxication cases does not lie with legal principles as stated in the 2003 Act - section 74 on consent, freedom, and capacity is perfectly clear - but with the application of these principles to the infinite vagaries of

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68. *Id.* at 167.

69. *R. v. Olugboja*, [1982] Q.B. 320, 330 (appeal taken from Eng.). Arguably the position in Scots law is the same, in light of the reforms introduced by the case of *Lord Advocate's Reference No.1 of 2001* 2002 SCCR 435.

human behavior and the difficulties of proof.<sup>70</sup> These hurdles are indeed particularly daunting in intoxication cases. However, the legal principles, encapsulated in the 2003 legislation, regarding capacity and freedom to choose, are not without difficulty, especially if judges are unwilling to flesh out these rather skeletal concepts by giving guidance as to the kinds of cases where capacity is sufficiently undermined. At the very least, as the court in *R. v. Bree* stated, the judge should be directing the jury as to how to apply general principles of capacity – awareness, understanding, and ability – to the facts of the case before them.<sup>71</sup> But, in the absence of (and perhaps impossibility of) any legislative guidance as to what counts as (in)capacity or extreme drunkenness, there should be some judicial guidance as to what kinds of factual situations could establish a lack of awareness, understanding, and ability.

In the earlier case of *R. v. Gardner*,<sup>72</sup> the court also confronted the problem of intoxicated consent, although here the complainant was a fourteen year old girl who had been digitally penetrated by a nineteen year old boy. *Gardner* was a sentencing appeal as the defendant had pled guilty to sexual activity with a child under section 9 of the 2003 Sexual Offences Act, to which consent is not a defense.<sup>73</sup> Despite the fact that the defendant had been asked to look after the complainant as she was very drunk, he followed her into the bathroom and propositioned her while she vomited. Although the complainant could not and did not answer, he digitally penetrated her.<sup>74</sup> At the sentencing stage, the trial judge accepted that “what the defendant had done was consensual,” even if it was drunken consent and despite the fact that the young woman had been “taken advantage of.”<sup>75</sup>

The cases of *Bree* and *Gardner* highlight both the dangers of case by case judicial interpretation of capacity to consent to sexual intimacy, and the need for more detailed guidance for both judges and juries on

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70. [2007] EWCA Crim 804, 167-68, [2007] 2 Crim. App. R. 13 (appeal taken from Eng.) (U.K.).

71. Ashworth, *supra* note 27, at 902.

72. *R. v. Gardner*, [2005] EWCA Crim 1399 (appeal taken from Wales) (U.K.).

73. *Id.*

74. *Id.*

75. *Id.* at ¶ 11. The appellate court further accepted that the defendant had reasonably believed there to be consent, even though he knew she was drunk, and although, as they themselves said, the defendant knew she was only 14 and that “consent could not possibly justify what he was doing.” *Id.* at ¶ 15. The recommendation put forward by the Home Office in its 2006 consultation paper, that there should be a statutory definition of capacity, does not address the issue, highlighted in *Gardner*, of the troubling persistence of defendants’ claims to reasonable belief in consent *despite* incapacity.

intoxication and (in)capacity to consent. In neither *Gardener* nor *Bree*, on the facts, does the complainant appear to have capacity to consent. However, even if it were found on the facts that there was room to doubt this conclusion, the courts could at least acknowledge that these are the *kinds* of circumstances where capacity is in doubt.

That is not to say that either memory loss or vomiting always in themselves imply incapacity to consent. But there are strong reasons to think that if someone is suffering from these kinds of problems, this would indicate extreme intoxication so that lack of capacity to consent would be indicated. In other words, if following alcohol consumption the complainant has experienced one or more of a cluster of possible symptoms – vomiting, inability to speak or move, memory loss, or periods of unconsciousness for example<sup>76</sup> – it may be assumed that she did not have capacity to consent, unless the defendant can show and the jury believes that she in fact was not extremely intoxicated and had in fact given consent. Again, if a back calculation of intoxication level could be used to a high degree of certainty, this could be one piece of relevant probative evidence to take into account. If it can be shown, for example, that it is highly likely that the complainant was extremely intoxicated at the time of the alleged offense, this could *prima facie* bring her within a possible “extreme drunkenness” statutory rebuttable presumption, discussed above, and could also raise questions about the reasonableness of the defendant’s claim to belief in consent.

However, where the victim is drunk short of the point of unconsciousness, there is broad scope for the defendant and the victim to disagree about the degree of intoxication and incapacity, particularly where back calculation is either not available (because of delay in reporting) or insufficiently accurate, and where there are no other witness accounts. One issue is the worry (expressed in the 2006 government consultation document amongst other places) that since alcohol is also a disinhibitor, a woman who has sex when she is drunk (but not incapacitated) will regret the encounter the following morning and that she will ‘cry rape’ by retrospectively trying to revoke her consent through exaggerating the extent of her drunkenness. Aside from the unfounded nature of this claim (and the exaggerated problem of false allegations),<sup>77</sup> one resulting problem is that in the courtroom it translates

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76. Of course, sexual intercourse with a woman who is unconscious and has not previously stated that she wants to have sexual intercourse in such a state (itself an unlikely scenario), is rape under both Scottish and English law in any case.

77. For discussion of this problem, see Philip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128 (2006). See also KELLY ET AL., *supra* note 33.

into the defendant's claim that the complainant was not drunk enough to be incapable but only drunk enough to be loosened up or disinhibited – i.e., that she gave drunken consent. The defendant claims an appearance of lack of intoxication as part of a defense of consent or belief in consent. Again here the void left by vague legal principle and an absence of judicial direction on capacity is filled by the defendant's allegations of the actuality of consent despite drunkenness, the *appearance* of soberness, or the appearance of sufficient capacity to consent, so that whether or not the victim in fact has capacity to choose becomes a secondary matter.<sup>78</sup>

Of course, there may be plenty of supporting evidence to suggest that the victim was indeed extremely drunk – if for example she was seen collapsing or vomiting, or had to be carried into a taxi. In these kinds of cases the defendant's assertion that he did not believe her to be drunk is less likely to be accepted by the court, but still it is a question of establishing the degree of intoxication, hence, the credibility of the witnesses is paramount. As argued above, there are residual prejudices and biases inherent in the jury decision making regarding the responsibility and credibility of a woman who has been drinking. And if indeed the defendant genuinely did not believe the complainant to be drunk beyond capacity point, and believed her to be consenting, the *mens rea* criteria for an offense of rape, in England and Wales at least, only require that this belief of valid consent be “reasonable in all the circumstances” (another vague and unhelpful phrase) rather than reasonable *per se*.<sup>79</sup>

The phrase that seems to emerge in the claims of these defendants is that the victim was “drunk but not incapable,”<sup>80</sup> begging the question, incapable of what? It appears that as long as the victim is capable of walking, or talking, or even of being sick, this means that she is capable of having consented to sex. The possibility is not considered that in light of our supposed commitment to the ideal of sexual autonomy, and

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78. Of course, it is possible to reduce this point to the base line argument that lack of *mens rea* always trumps the existence of *actus reus*. However, this paper focuses only on the issue of the lack of clarity on a key *actus reus* issue, that is, lack of consent. For discussion of the significant problems associated with the *mens rea* of rape, see Sharon Cowan, *Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape*, in *SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS* 51-71 (Vanessa Munro & Carl Stychin eds., 2007); Heather Douglas, *Stories of Mistaken Consent: Still in the Shadow of Morgan*, in *CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY* 109 (Rosemary Hunter & Sharon Cowan eds., 2007).

79. Sexual Offences Act, 2003, c. 42, § 1(2) (U.K.). For a critique, see Cowan, *supra* note 78.

80. See, e.g., *R. v. Bree*, [2007] EWCA Crim 804, 162, [2007] 2 Crim. App. R. 13 (appeal taken from Eng.) (U.K.).

criminal law's central role in protecting that sexual autonomy, the capacity to consent to sexual intimacy might require a higher threshold of cognitive and rational ability than the level required to stumble home, unlock the door and promptly vomit in the shower.

More worryingly, it seems that even intoxication leading to intermittent periods of unconsciousness will not in itself be thought to sufficiently undermine a woman's capacity to consent to sex.<sup>81</sup> This seems to be the case, notwithstanding the conclusion of the court in the English case of *R. v. Kaitamaki*,<sup>82</sup> where the Court of Appeal held that consent has to be present throughout the duration of the intercourse if sex is to be consensual.<sup>83</sup> In a Scottish case, *Peace v. HMA*,<sup>84</sup> one of the appeal judges went so far as to say that even though the complainer<sup>85</sup> had been unconscious for some of the period during which sex had taken place (the accused was seen by witnesses having sex with the complainer while she was "out cold"), that we should remember that consciousness can be intermittent and that while the complainer had earlier collapsed and had been thought to have no pulse, this did not reflect on her ability while *later* conscious to consent to sex.<sup>86</sup>

It was not claimed that the complainer had previously said that she would have sex whilst extremely intoxicated or unconscious, but rather that what appears to be extreme intoxication was found not to negate later consent, because of the presence of some consciousness. Not only that, but the judge said, where there are periods of consciousness and unconsciousness following each other in quick succession, "it is just these situations in which misunderstandings may well arise."<sup>87</sup>

This kind of judicial statement does nothing to offer sound, reasoned guidance on incapacity and indeed arguably directly contradicts the notion that in cases such as these, the judge ought to

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81. This result is in contrast to the pre-2003 Sexual Offences Act English case, *R. v. Malone*, [1998] 2 Crim. App. R. 447 (appeal taken from Eng.), where a girl who was described as being in a near helpless state and was in and out of consciousness, was said not to be required to explicitly signal her lack of consent to intercourse. *R. v. Malone*, [1998] 2 Crim. App. R. 447, 449 (appeal taken from Eng.). Given that Scots criminal law on rape is lagging behind other jurisdictions regarding much needed reform and modernization, it may be the case that such problematic decisions are more likely in Scotland than, say, in England and Wales, at least until the reforms proposed by the SLC are brought into being. SCOTTISH LAW COMMISSION *supra* note 46.

82. *R. v. Kaitamaki*, [1985] A.C. 147, 151-52 (appeal taken from N.Z.), *aff'd* [1980] N.Z.L.R. 59. Thanks to Victor Tadros for discussion on this point.

83. *Id.* at 151-52.

84. *Peace v. HMA*, [2003] S.C.C.R. 166 (H.C.J.) (Scot.).

85. The Scottish term equivalent to the English term complainant.

86. *Id.* at ¶ 7 (per Lord Marnoch).

87. *Id.*

direct the jury that a complainant who is in such a state may well not be capable of consenting at all. These cases demonstrate that where a woman is intoxicated but not rendered completely unconscious, judges are unwilling to give practical guidance on what amounts to incapacity, even in individual cases.

Judicial resistance to the notion that a woman who has been drinking could be raped has a long history. Kim Stevenson documents the 19th century roots of the gendered stereotypes underlying discriminatory treatment of women who allege rape.<sup>88</sup> She notes for example that the comment of Mr. Justice Willes in 1856, doubting that the offense of rape could be committed “upon the person of a woman who had *rendered herself* perfectly insensible by drink.”<sup>89</sup> As Stevenson points out, “Modifications of these assumptions have been slower to come than changes to formal legal rules.”<sup>90</sup> Arguably, the relevant issue for the purposes of assessing capacity is the degree of intoxication rather than whether or not intoxication was self induced.<sup>91</sup> Where a person is drunk to the point of vomiting and memory black out, the reasons for being in such a condition, including the notion of fault in bringing it about, is irrelevant to a meaningful understanding of capacity to consent. Consent cannot be unquestioningly assumed (and arguably there can rarely be a well founded *reasonable* belief in consent on the part of the defendant) if one party is incapacitated, self-induced or otherwise, and communication is compromised, to this degree. Stevenson’s argument, that Victorian social expectations about appropriate gender roles and behavior continue to influence the way in which complainants are treated in rape trials, has significant persuasive force when considered in light of the Finch and Munro study, and the recent cases discussed in this paper. For Stevenson, the complainant who does not conform to prevailing social norms about gender becomes, in the course of the rape trial, a protagonist rather than a victim. This returns us to the issue of the problematic way in which responsibility for sexual assault is deeply gendered.

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88. Kim Stevenson, *Unequivocal Victims: The Historical Mystification of the Female Complainant in Rape Cases*, 8 FEMINIST LEGAL STUD. 346, 352 (Springer Netherlands 2000).

89. *Id.* (emphasis added).

90. *Id.* at 345.

91. That is not to say that the question is completely irrelevant – if the victim was involuntarily intoxicated by the defendant, this should have a bearing on his degree of culpability for the rape and may also constitute a separate offense, for example administering a substance, or assault.

## VI. CONCLUSION

Alan Wertheimer claims that whether or not an intoxicated consent is valid is both an empirical and a moral question. He suggests that:

The point of respect for autonomy is to give people control over what matters to them. We cannot determine what respecting a woman's autonomy involves until we have a better – empirically grounded – understanding of their experience with respect to intoxicated sexual relations.<sup>92</sup>

This seems to be a plea for more research into the issue of intoxicated consent – on women's experiences of sex when intoxicated and perhaps also men's experiences and perceptions of women's intoxicated consents. It is not unusual to end a paper with a plea for more research. But it is not enough to claim that intoxication is an empirical question that varies from person to person and case to case. The protection of women's bodily integrity and sexual autonomy is also a moral question. There needs to be clearer guidance within the law as to the kinds of behaviors that would put triers of fact on notice that consent may be invalid due to high levels of intoxication.

Since the judges appear to be reluctant to give proper guidance on (in)capacity, two conclusions should follow. First, the Judicial Studies Board should issue guidelines or model directions for judges on capacity in intoxication sexual assault cases, including examples of the kinds of factual situations in which consent would be in doubt. Second, Parliament should introduce legislative reforms that would include consent given in circumstances of extreme drunkenness as one of the situations where consent is not present (or at least, where non-consent is rebuttably presumed). In any case, what is clear is that courts need more support and guidance, which is not tainted by discriminatory views about appropriate gender behavior, on how to tell the difference between someone who is intoxicated to the point of being unable to consent to sex, and someone who is drunk and yet retains sufficient capacity to consent to sex. Alongside a statutory based test and guidance on capacity, more education and training is required for judges and potentially also juries, on the ways in which intoxication can obviate and obscure consent in ways which leave women unprotected by the criminal law. A further option would be the introduction of specialist sexual

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92. ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 251-52 (Cambridge University Press 2003).

offenses courts.<sup>93</sup> However, as Rumney and Fenton emphasize, “further legislation is not a ‘cure all;’ ”<sup>94</sup> alongside these changes we do need to know more about women’s views and experiences of intoxicated sex, as well as asking why it is that men want to have sex with women who are extremely drunk to the point of vomiting. We also need to continue to address the issue of responsibility for sexual activity, as well as the prejudices and biases around women’s responsibility for attacks perpetrated upon them while they are voluntarily intoxicated. Unfortunately, the criminal law is not well suited to such a task.

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93. Such specialist courts have been introduced in South Africa – for discussion see for example, Stephen P. Walker & Dap A. Louw, *The South African Court for Sexual Offences*, 26 INT’L J.L. & PSYCHIATRY 73 (2003).

94. Rumney & Fenton, *supra* note 51.